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IN THE

Supreme Court of the United States

October Term, 1970

No. 1211

TRAVIS LEVY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner Travis Levy prays that this Court grant rehearing of its order of March 8, 1971, denying the petition for a writ of certiorari, and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, in the above entitled case as prayed for in the petition filed on or about January 7, 1971.

The principal basis for this petition for rehearing is the fact that on or about January 11, 1971, this Court granted certiorari in the case of *Bostic* v. *United States* (No. 5250, October Term 1970), which contains questions and issues identical to those presented in this case. Petitioner sought to submit these issues in a reply brief, but the order denying certiorari was filed on the same

day that petitioner's reply brief was received by the Clerk of this Court, and said reply brief was thereupon returned unfiled to petitioner's counsel. Consequently, petitioner respectfully submits that this is an appropriate case for the grant of a petition for rehearing. The argument of petitioner is also cast in terms of an additional question presented.

I

In light of the Court's holding in *Bruton* v. *United States*, 391 U. S. 123 (1968), overruling *Delli Paoli* v. *United States*, 352 U. S. 232 (1957), that statements of a co-conspirator may not be received in evidence against a non-present defendant, and the fact that the scope of the *Bruton* holding is now under review by this Court by its grant of certiorari in *Bostic* v. *United States* (No. 5250, O. T. 1970), petitioner Levy respectfully submits as an additional question presented the following:

> "4. Whether *Bruton* v. *United States*, 391 U. S. 123 (1968) overruled the holding in *Caminetti* v. *United States*, 240 U. S. 470 (1917), to the effect that a defendant may be convicted on the uncorroborated testimony of a purported co-conspirator; and whether, in any event, *Caminetti* should be reconsidered, reevaluated and overruled in the light of *Bruton*."

In the petition for certiorari herein (at page 25) petitioner adverted to the "rule" in *Caminetti*, to the effect that a defendant may be convicted on the uncorroborated testimony of a co-conspirator. Subsequent to the filing of the petition the Court granted certiorari in *Bostic*, *supra*, causing counsel for petitioner to rethink and reconsider his position with respect to the effect of *Bruton* on *Cam-*

minetti. It would now appear that *Cammineti*, despite its age and citation, has been discredited by *Bruton*, if not effectively overruled by it. To make clear the present status and vitality of *Cammineti*, it is respectfully submitted that the additional question presented herein should be considered by the Court and certiorari granted as to it.

When the *Bruton* case is briefed and argued before the Court, there will be presented the question of the effect of *Bruton* on the admissibility in evidence of statements by one conspirator against all members of a conspiracy, and not only the declarant. (See 39 U. S. L. W. 3339-3340). Necessarily included in this question is the effect of *Bruton* upon the fundamental rule in *Cammineti* that a co-conspirator's uncorroborated testimony is sufficient to warrant the conviction of a defendant. By the additional question presented herein, petitioner seeks a direct review of that question, and believes it is of great importance in the proper administration of federal criminal justice. Petitioner contends that this additional question is raised by the record and by the other issues in this case.

Petitioner repeats that the government agent Itkin, the principal witness in this case, was not a co-conspirator, whether by allegation, by his testimony, or by his conceded status as a government agent. The government suggests in its Brief in Opposition (p. 11) that "the evidence indicated that Itkin did participate criminally in the conspiracy, although he was not named as a co-conspirator in the indictment; he knew his conduct to be criminal (Tr. 1401), had consistently lied to the FBI to conceal his involvement (Tr. 1245, 1247, 1252, 1259, 1279-1280), and kept whatever money he made (Tr. 1744)."

Petitioner Levy disputes these contentions and arguments. Again, the government overlooks or ignores the fact that Itkin alone testified as aforesaid, without sup-

port in the record or corroboration from any source whatsoever. Thus, it is only Itkin's uncorroborated testimony that he made these purported illegal "payoffs" to co-defendants Zaffarino and Plumeri,[1] purportedly constituting the only criminal conduct in this case. In his testimony, Itkin acknowledged that such "payoffs" were not made in the presence of petitioner Levy, and accordingly such testimony was not binding upon Levy and should not have been received in evidence against him. The precise question of the admissibility of this testimony against Levy will be incidentally reviewed in the *Bustin* case; it should also be directly reviewed in this case.

The Court may perhaps wish to defer decision on this petition for rehearing pending its disposition of the *Bustin* case on the merits, but petitioner Levy nevertheless respectfully suggests that this case also should be heard on the merits. Accordingly, rehearing should be granted and certiorari should thereupon be granted, with argument to be heard together with *Bustin*.

II

The government has not ever refuted petitioner's argument that Itkin was employed and acted as a government agent throughout this case. Nevertheless, the government's whole argument rests upon Itkin's self-serving testimony that he acted criminally in this case. From this bootstraps technique the entire line of the government's response flows. For example, Itkin is characterized as "Levy's agent in the kickback negotiations" (p. 11, Br. in Opp.), although only Itkin is purported to have established the agency relationship. There is nothing in this record, apart from

[1] As to both of whom the trial had been severed.

Itkin's words, that authorizes such argument or contention that Itkin was Levy's agent. As a matter of fact, the complete trial testimony in this record shows that Levy distrusted Itkin, refused to deal in cash, insisted upon proper documentation of all transactions and that as a result, Itkin had great hatred and animosity towards Levy.

Moreover, the government has not said one word in response to the arguments in the petition concerning the inflammatory and prejudicial character of Itkin's redirect testimony about his "mission to infiltrate" the underworld, except that the trial judge told the jury that Itkin's redirect testimony was not being received for its truth, but only on the question of Itkin's credibility. This type of legal mumbo jumbo is a clear violation of the *Bruton* holding, *supra*, that jurys do not follow a judge's instructions that they are not to consider the substance of the testimony but only the limited purpose for which it is received. Such clearly prejudicial testimony should not have been received at this trial.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, it is respectfully prayed and urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

DANIEL H. GREENBERG
Counsel for Petitioner

March 29, 1971

Certificate of Counsel

DANIEL H. GREENBERG, counsel for petitioner Travis Levy, hereby certifies that the within petition is presented in good faith and not for delay, and that it is restricted to intervening circumstances of substantial and controlling effect, and to other substantial grounds available to petitioner although not previously presented.

DANIEL H. GREENBERG

March 30, 1971